Supreme Court, U.S.
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No. 92-1672

In The

Supreme Court of the United States

October Term, 1992

JOHN MUSSER,

Petitioner,

v.

PASADENA UNIFIED SCHOOL DISTRICT,
CALIFORNIA STATE BOARD OF EDUCATION,

Respondents.

**On Petition For Writ Of Certiorari
To The California Court Of Appeal,
Second Appellate District**

BRIEF OF RESPONDENT PASADENA UNIFIED SCHOOL DISTRICT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the California Court of Appeal, in holding that the State Board of Education was subject to strict scrutiny in its determination of the area of election, applied the correct standard of review.

2. Whether the California State Board of Education demonstrated a compelling state interest in limiting the franchise to the electorate of the 71-family transfer area, and excluding the electorate of the Pasadena Unified School District.

3. Whether the California Court of Appeal correctly determined that the limitation of the franchise to the electorate of the 71-family transfer area violated equal protection guarantees.

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BRIEF OF RESPONDENT PASADENA UNIFIED SCHOOL DISTRICT IN OPPOSITION

STATEMENT OF THE CASE

This dispute arises from a petition to the California State Board of Education to transfer territory from the Pasadena Unified School District ("PUSD") to the San Marino Unified School District ("SMUSD"). Forty-seven school age children reside in the transfer area, which

consists of 71-homes located in a portion of an unincorporated area of Los Angeles County. The entire unincorporated territory includes 900 homes, and has been served by the PUSD for more than 70 years.

The same group of homeowners requesting the school territory transfer also filed a petition with the Local Agency Formation Commission ("LAFCO") for annexation of the 71-home area to the City of San Marino. The residents of the remaining 829 homes in the unincorporated area initiated separate annexation proceedings with LAFCO to join the City of San Marino. At the time of the State Board's approval of the petition to transfer, in September, 1990, neither area had been approved for annexation by the City of San Marino. On February 7, 1991, the City of San Marino rejected both petitions for annexation.

In September, 1990, when the petition to transfer was approved, the population of the community served by the PUSD was approximately 55.5% White, 22.4% Black, 15.3% Hispanic and 6.5% Other. The student population of the PUSD was 39% Black, 35% Hispanic, 21% White and 5% Asian and Other. In contrast, the SMUSD was approximately 57.3% White, 39.4% Asian, 2.8% Hispanic, and 0.6% Black and Other.

The PUSD, which operated under a court ordered desegregation program from October, 1970, to October, 1979, and since the latter date has operated under a court approved voluntary desegregation plan, has seen the White student population drop from 57.3% in 1970 to 21% as of September, 1990. Consequently, the transfer was opposed by the PUSD on the grounds that it would

perpetuate the historic pattern of White flight from the racially diverse PUSD. The PUSD further argued that if the transfer were allowed, the entire unincorporated area, of which the subject transfer area is but a small part, would also leave the PUSD by means of similar, numerically insignificant transfer petitions.

On November 1, 1989, the Los Angeles County Committee on School District Organization found that while the criteria in *Education Code* § 35753 were met, there was no compelling reason to approve the transfer. It is noteworthy that the Committee recommended that if the State Board of Education approved the transfer, the election should be held in the PUSD *and* the SMUSD. On June 8, 1990, the State Board denied the petition on the same grounds.

On June 29, 1990, Petitioner herein, John Musser, requested a rehearing of the petition to transfer. Hearings on the request for a rehearing and on the merits of the petition were conducted on September 13-14, 1990. The State Board of Education granted a rehearing, approved the petition, and limited the election on the transfer to the voters in the transfer area.

The State Board's decision to limit the election to only those voters residing in the transfer area rested on the conclusion that, "the area under petition would probably be overwhelmed by a much larger number of uninterested or incidentally interested voters" in the PUSD and the SMUSD, and that, "there is a compelling state interest in reducing the area of election to the area proposed to be transferred." The State Board's decision was largely influenced by the assumption that the number of

students actually enrolled in the PUSD would be the same number of students transferred to the SMUSD [3 of 47 students residing in the transfer area], and that the impact of such a student transfer would be negligible. Thus, the State Board concluded that the voters in the PUSD and the SMUSD had no substantial interest in the matter.

Following the State Board's reversal of its prior decision denying the petition, the PUSD sought a writ of mandate in the Los Angeles Superior Court pursuant to *Code of Civil Procedure* § 1085. On February 19, 1991, the Honorable Ronald M. Sohigian denied the petition, dismissing the PUSD's claims regarding the severe isolation of racial minorities in the PUSD, and the further claim that the proposed transfer would perpetuate a historic trend of racial segregation in the PUSD. Judge Sohigian also rejected the PUSD's claim that the decision restricting the election to the transfer area was impermissibly based on the conclusion that the votes of those residents would be "overwhelmed" by the votes of the entire PUSD and SMUSD, and thus violated equal protection guarantees.

On February 28, 1991, the PUSD filed a Notice of Appeal of the trial court's decision denying the petition for a writ of mandate. The PUSD also sought a writ of supersedeas to enjoin the election in the transfer area from going forward pending the appeal. The petition for the writ of supersedeas was denied, and on March 5, 1991, the residents of the 71-homes in the transfer area voted overwhelmingly to leave the PUSD and join the SMUSD.

In an opinion issued on February 6, 1992, the Court of Appeal for the Second Appellate District reversed the

decision of the trial court denying the petition for writ of mandate. The Court of Appeal determined that the exclusion of qualified voters within the PUSD was subject to strict scrutiny, and rejected the contention that the voters in the PUSD were disinterested in the transfer. *Pasadena Unified School District v. State Board of Education*, 9 Cal.App.4th 767, 4 Cal.Rptr.2d 532 (1992). The court further held that the interests of the voters in the PUSD in retaining a declining White student population could not be dismissed as insubstantial. 9 Cal.App.4th at 778.

On February 21, 1992, Petitioner sought a rehearing in the California Court of Appeal, Second Appellate District. The request for a rehearing was denied on February 28, 1992.

On March 17, 1992, Petitioner filed a Petition for Review in the California Supreme Court. The petition was granted on April 23, 1992, but review was stayed by order of the Court, pending its decision in the related case of *Sacramento County Board of Supervisors, et al. v. Sacramento Local Agency Formation Commission, et al.*, 3 Cal.4th 903, 13 Cal.Rptr.2d 245, 838 P.2d 1198 (1992). The issue in that case was whether an election on an incorporation of a portion of Sacramento County territory could be constitutionally limited to the incorporating electors.

On November 17, 1992, the California Supreme Court rendered its decision in the *Board of Supervisors* case, upholding under the rational basis test the constitutionality of the State statute [*Government Code* § 57103] limiting the franchise to the electors in the incorporating area, and finding no violation of equal protection guarantees. However, as will be explained hereinbelow, the

Court's decision included two (2) critical distinctions between that case and the case at bar. Consequently, the decision in the *Board of Supervisors* case was not binding upon the Court in its subsequent deliberations in this case. On December 17, 1992, the Court dismissed Petitioner's request for review.

ARGUMENT

I.

THE CALIFORNIA COURT OF APPEAL CORRECTLY APPLIED THE STRICT SCRUTINY TEST TO THE DECISION OF THE STATE BOARD OF EDUCATION, LIMITING THE FRANCHISE TO THE ELECTORATE OF THE TRANSFER AREA

The threshold issue is whether the Court of Appeal correctly applied strict scrutiny to the State Board's decision limiting the franchise to the transfer area, and excluding the electorate of the existing governmental entity [PUSD] from which the territory would be transferred. The decisions of this Honorable Court and the California Supreme Court strongly indicate that the Court of Appeal applied the correct standard of judicial review. *See, Bullock v. Carter*, 405 U.S. 134, 144, 31 L.Ed.2d 92, 92 S.Ct. 849 (1972), *Cipriano v. City of Houma*, 395 U.S. 701, 706, 23 L.Ed.2d 647, 89 S.Ct. 1987 (1969), *Phoenix v. Kolodziejski*, 399 U.S. 204, 26 L.Ed.2d 523, 90 S.Ct. 1990 (1970), *Kramer v. Union School District*, 395 U.S. 621, 626-632, 23 L.Ed.2d 583, 89 S.Ct. 1886 (1969), and *Fullerton Joint Union High School District v. State Board of Education*, 32 Cal.3d 779, 799, 187 Cal.Rptr. 398, 654 P.2d 168 (1982). *See also, San Dieguito Union High School District v.*

Rosander, 171 Cal.App.3d 968, 978, 217 Cal.Rptr. 737 (1985), and *Hawn v. County of Ventura*, 73 Cal.App.3d 1009, 1018, 141 Cal.Rptr. 111 (1977). In each of the cited cases, the courts applied the strict scrutiny test to the exclusion of qualified voters within an existing governmental entity of general jurisdiction, and invalidated the exclusion on equal protection grounds.

II.

THE CALIFORNIA STATE BOARD OF EDUCATION FAILED TO SHOW A COMPELLING STATE INTEREST IN LIMITING THE FRANCHISE TO THE ELECTORATE OF THE TRANSFER AREA, AND EXCLUDING THE ELECTORATE OF THE PASADENA UNIFIED SCHOOL DISTRICT

In *Kramer v. Union School District, supra*, 395 U.S. at 626, this Honorable Court determined that,

> ". . . . [W]e must give the statute a close and exacting examination. '[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.' (Citations omitted.)"

The State may avoid the strict scrutiny of equal protection if the classification or designation of election territory has only minimal, if any, effect on the fundamental right to vote. *Fullerton Joint Union High School District v. State Board of Education, supra*, 7 Cal.3d at 799; *Kramer v. Union School District, supra*, 395 U.S. at 632; *Evans v. Cornman*, 398 U.S. 419, 422-423, 26 L.Ed.2d 370, 90 S.Ct. 1752 (1970).

Petitioner's contention on this issue is that because of the small number of school age children (47) in the transfer area (71 homes), and the even smaller number (3) of students actually attending PUSD schools, there is no substantial impact on the electoral process. But Real Party's analysis misperceives the substantial impact rule. It is what the exclusion does to the **process** that is the issue. If the exclusion lacks constitutional integrity because of its unequal effect on similarly situated voters, it has a real and appreciable impact on the electoral process. Put another way, if interested voters are excluded and disinterested voters are included, the classification cannot pass constitutional muster. *Kramer v. Union School District, supra,* 395 U.S. at 632.

Respondent acknowledges that there is authority for the proposition that the state may, **in a proper case,** exclude qualified voters whose interest in the outcome of the election is **di minimus,** or peripheral. However, the overwhelming body of authority has been reluctant to discount the interests of a particular class of voters on the grounds that their interest is **di minimus.** *Kramer v. Union School District, supra,* 395 U.S. 621 (exclusion of single adult without children struck down); *Cipriano v. City of Houma, supra,* 395 U.S. 701 (Louisiana property taxpayer limitation on franchise violates equal protection clause); *Phoenix v. Kolodziejski,* 399 U.S. 204 (Arizona property taxpayer limitation on franchise struck down); *Westbrook v. Mihaly, supra,* 2 Cal.3d 765, 837 Cal.Rptr. 839, 471 P.2d 487 (1970) (super majority voting requirement held invalid, the Court defining its task as deciding whether "the challenged provision is compatible with the

demands of equal protection as they apply in contemporary society"); *Curtis v. Board of Supervisors, supra,* 7 Cal.3d 942, 104 Cal.Rptr. 297, 501 P.2d 537 (1972) (landowner veto on incorporation protest held invalid on equal protection grounds); *Choudhry v. Free, supra,* 17 Cal.3d 660, 131 Cal.Rptr. 654, 552 P.2d 438 (1976) (*Water Code* § 21100 requiring director of irrigation district to be freeholder invalid on equal protection grounds); *Fullerton Joint Union High School District, supra,* 32 Cal.3d 779 (exclusion of voters in Fullerton High School District from voting on secession of Yorba Linda held invalid on equal protection grounds); *Hawn v. County of Ventura, supra,* 73 Cal.App.3d 1009 (exclusion of non-city voters in the county from voting on location of airport held invalid on equal protection grounds); *San Dieguito Union High School District v. Rosander, supra,* 171 Cal.App.3d 968 (exclusion of electors in high school district from vote on withdrawal of elementary high school district invalid under equal protection clause).

In the instant case, there are 47 school age children residing in the 71-home transfer area. Axiomatically, not every household in the transfer area has a child who will be effected by the transfer. Indeed, almost one third (1/3) of the homes transferred would apparently be uneffected. As to those families, there can be no "primary" interest. Nor can there be any presumption made about the significance of their interests as compared to the interests of the qualified electors excluded from voting by the State Board's decision. Consequently, the subject exclusion of eligible electors in the PUSD, and in the remaining unincorporated area, as well as the entire SMUSD, fails to

demonstrate "sufficient precision" to survive the "exacting scrutiny" which the law requires. *Kramer v. Union School District, supra,* 395 U.S. at 632.

III.

THE CALIFORNIA COURT OF APPEAL CORRECTLY DETERMINED THAT THE LIMITATION OF THE FRANCHISE TO THE 71-FAMILY TRANSFER AREA VIOLATES EQUAL PROTECTION GUARANTEES

In finding that the designation of the election area violates equal protection guarantees, the Court of Appeal reasoned as follows:

> With commendable candor, Pasadena Unified School District appropriately acknowledges that the instant secession, per se, would represent no significant financial impacts and it is unlikely the loss of the small number of students directly involved would have a substantial effect upon either curriculum or facilities. Nevertheless, the racial impact upon the whole would be significant; immediately upon morale, and in the future when this reorganization would serve as a model against the acute social problems of its predominantly minority district. Today segregation is more apt to occur in nibbles than gulps.
>
> It is true that at least some of the Greenwood Addition residents would be more sharply affected at the outset, since those with children would be able to enroll them in the public schools in the San Marino School District. However, the other residents of the Pasadena Unified School District concerned with their

public schools might feel the loss of that territory and the undermining of historic efforts to integrate the district more strongly than do the residents of the Greenwood Addition who have no school-aged children or whose children would continue to attend private schools.

We do not doubt that the interests of the residents of the Greenwood Addition and those of the Pasadena and San Marino Unified School Districts coincide to the extent that they all desire the greatest possible educational opportunities for their children. That they may take opposing positions regarding the transfer does not mean that any group of voters is merely selfish or disinterested, but only that different interests are at stake. The fact that the Pasadena Unified School District's includes a desire to retain a declining White student base is not a reason to disenfranchise its citizenry. Consequently, we find the holding of the court in *Fullerton Joint Union High School District v. State Board of Education, supra,* 32 Cal.3d at page 806, equally apposite here:

"In sum, we do not view the classification at issue here as one which separates interested and uninterested voters, but one which divides two groups, each with a substantial although different interest in the election. In such a case the state has no compelling interest to grant the franchise to one group and deny it to the other. We therefore conclude that the decision of the State Board, to the extent it excluded [Pasadena Unified School District] residents from voting at the election to approve the proposed secession

> of [the Greenwood Addition] from the [Pasadena Unified School District], denied such residents the equal protection of the laws." 9 Cal.App.4th at 778.

The Court's reasoning finds substantial support in, and is consistent with, the *Board of Supervisors* decision. There, the California Supreme Court, in an opinion written by Justice Mosk, upheld the constitutionality of § 57103 of the California *Government Code* against a challenge on equal protection grounds. The Court held that the proper standard of judicial review was the rational basis test. There were two (2) bases for the Court's determination on the issue. First, the Court gave great weight to the fact that the statute limiting the area of election to the incorporating electors was grounded in "the state's plenary power to oversee and regulate the formation of its political subdivisions, and the same power entitles the state to identify as differing in degree the interests of those who may vote under § 57103 and those who may not." 3 Cal.4th at 914. In the case at bar, there is no statute that **requires** limitation of the area of election.

In this same regard, the Court recognized in The Knox Cortese Act of the California *Government Code* [56000 *et seq.*] a "labyrinthine" process containing elaborate safe-guards designed to protect the political and economic interests of affected local governments, residents, and landowners. *Board of Supervisors, supra,* 3 Cal.4th at 912. Here, the statute at issue gives the State Board, an appointed body, **discretion** to decide the area of election.

Furthermore, the Court expressly noted that there were *no* racial impacts before it. In this regard, the Court wrote that:

> Moreover, *Fullerton*'s plurality opinion evinces a great concern that failure to apply strict scrutiny to the election at issue could result in racial segregation. It acquiesces in but describes as "questionable" an administrative decision that the secession would not promote segregation. (32 Cal.3d at p. 793) Hence, notwithstanding the agency finding, the plurality found an equal protection violation in part because "the racial and financial impact of that Plan are matters of great concern to the residents who will remain in the Fullerton [high school district]." 3 Cal.4th at 918.

The *Board of Supervisors* decision [3 Cal.4th at 916] of the California Supreme Court follows the decision of this Honorable Court in *Lockport v. Citizens for Community Action*, 430 U.S. 259, 51 L.Ed.2d 313, 97 S.Ct. 1047 (1977). There, the rational basis test was applied to a New York State statute that forbade the implementation of a new Niagra County charter unless approved by concurrent majorities of both the city and non-city residents of the county. Based on the "realities of the distribution of governmental power in New York, and "the wide discretion the states have in forming and allocating governmental tasks to local subdivisions", this Honorable Court held that the classification did not violate equal protection guarantees.

In effect, the California Supreme Court acknowledged that cases involving the exclusion of qualified voters *and* racial impacts are properly subject to greater scrutiny. In so doing, the Court approved the reasoning of the Court of Appeal in the instant case that, "[w]hile we do not agree with the view of a transfer which might

provide a blueprint for the flight of other predominantly White neighborhoods, neither are we able to say the decision was necessarily arbitrary, capricious, or without evidentiary support." 9 Cal.App.4th at 795.

IV.

THIS CASE RAISES NO FEDERAL ISSUE OF GENERAL IMPORTANCE THAT WARRANTS REVIEW BY THIS HONORABLE COURT

The issues of law raised by the instant petition for certiorari are well settled. The level of review, where the right to vote is at stake, and an existing governmental entity is "carved up", is strict scrutiny. *Wesberry v. Sanders, supra,* 376 U.S. 1, 17 (1964); *Kramer v. Union School District, supra,* 395 U.S. 621, 632; *Bullock v. Carter, supra,* 405 U.S. 134, 144; *Cipriano v. City of Houma, supra,* 395 U.S. 701, 706; and *Phoenix v. Kolodziejski, supra,* 399 U.S. 204.

The decision of the Court of Appeal *follows* settled law in terms of the level of review and its analysis of the issues. The Court's determination that the State Board of Education had no compelling interest in "granting the franchise to one group and denying it to the other" raises no issue worthy of review by this Honorable Court.

V.

CONCLUSION

For each of the foregoing reasons, the PUSD respectfully opposes the instant petition for certiorari, and asks that it be denied.

Respectfully submitted,

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REPLY

BRIEF

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REPLY BRIEF OF PETITIONER, JOHN MUSSER, TO BRIEF OF RESPONDENT PASADENA UNIFIED SCHOOL DISTRICT IN OPPOSITION

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SUMMARY OF ARGUMENT

Respondent, the Pasadena Unified School District ("PUSD") opposes the right of 126 voters in 71 homes containing 47 school-age children (the "Transfer Territory") to transfer their homes to the adjacent San Marino Unified School District ("SMUSD"), as ordered by the California State Board of Education, unless 109,000 voters of the entire 21,600 student PUSD vote in a one-time ratification election. That election is the final step in an arduous, multi-level hearing process during which PUSD and the Petitioner presented their cases at **seven** public hearings. The process was concluded by the granting of Petitioner's petition by the California State Board of Education, which is vested by California law with the authority to determine such matters (subject to the final ratification vote of the residents affected).[1]

The Superior Court below found that the non-Transfer Territory voters had no interests at stake in this ratification election and upheld the State Board of Education's decision to limit the election territory to the Transfer Territory voters. The California Court of Appeal reversed holding that the transfer itself had a "racial impact" on the PUSD and ordered the election expanded to include the 109,000 voters of the entire PUSD, but otherwise upheld the transfer (as though a vote can render a supposedly adverse "racial impact" constitutionally acceptable).

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[1] The eleven members of the California Board of Education are appointed by the Governor and must be confirmed by the California State Senate.

The Opposition Brief of Respondent, by omission, targets the precise reason this case should be heard by this Court: Whether **any** facts must be shown by a litigant to exist before a court will overturn a quasi-legislative decision on constitutional grounds? In this case, no facts exist which can support the conclusion of the California Court of Appeal that the interest of racial balance is at risk, implicated, compromised, or involved in any way. The *claim* of race was made by the PUSD. *No facts* were ever shown to sustain that claim. The only facts showed that the presence or absence of this tiny territory has *no measurable impact* on the PUSD, racial or otherwise.[2] Thus, no demonstrable link exists between the interests of the non-Transfer Territory voters and the election in question. The Court of Appeal is wrong and this Court should correct the error.

I.

THE "RACIAL IMPACT" OF THE PROPOSED TRANSFER, RELIED ON BY THE COURT OF APPEAL TO STRIKE DOWN AN INTERNAL BOUNDARY DECISION OF THE STATE OF CALIFORNIA, IS *AT MOST* A 00.1527% "IMPACT."

This Court, in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, at 16, 91 S.Ct. 1267 at 1276 (1971) held:

> . . . [J]udicial powers may be exercised only on the basis of a constitutional violation. . . .

---

[2] PUSD conceded the absence of any impact on its financial condition, attendance, curriculum or facilities resulting from the transfer.

In this case, there was no constitutional violation by the California State Board of Education on which to predicate the exercise of judicial power.

The issue can rightly be called the "00.1527% question." Despite the constitutional rhetoric of the PUSD and the Court below, the facts here are compelling but simple: PUSD has 21,600 students. 21% are white (4,536 white students). The Transfer Territory has 47 school-age children, 70% of whom are white (33 white school-age children).[3] Of the total PUSD population, the Transfer Territory white children would represent only 00.1527% of the student population if they attended PUSD schools. **Fifteen one-hundredths of a percent is a constitutional case?** That is why this case should be reviewed by this Court. The California Court of Appeal has invoked the Fourteenth Amendment to the United States Constitution to overturn a legitimate action of the State of California – regulating the boundaries of its **own** political subdivisions – on the basis of "racial impact" where that impact is fifteen one-hundredths of a percent. That sort of judicial activism should not be permitted.

---

[3] Only two white children attended PUSD schools at the inception of this process in 1988; no children of any race now attend PUSD schools from the Transfer Territory.

II.

PUSD IGNORES THE NEED TO ESTABLISH A PERSON'S "INTEREST" IN AN ELECTION BEFORE THAT PERSON MUST VOTE.

PUSD necessarily argues that any election held within the boundary of a particular political subdivision of a state must include all of the electors of that subdivision, unless limiting the vote to a smaller territory survives "strict scrutiny." Petitioner and the Superior Court judge below submit that a preliminary step to such a conclusion is a finding that *all the electors of the subdivision have a* ***substantial interest*** *in the* ***outcome*** *of that election in order to vote.* Respondent would have this court eliminate the need to identify that substantial interest because the voters the PUSD wants included simply do not have such an interest.

PUSD's Opposition Brief, at page 8, clearly demonstrates this crucial difference between its position and Petitioner's position:

> Petitioner's contention on this issue is that because of the small number of school age children (47) in the transfer area (71 homes), and the even smaller number (3) of students actually attending PUSD schools, there is no substantial impact on the electoral process. . . . It is what the exclusion does to the **process** [emphasis in original] that is the issue. . . . If the exclusion lacks constitutional integrity because of its unequal effect on similarly situated voters, it has a real and appreciable impact on the electoral process. . . .

This case is **not** about the "process." It is about who has an interest in the first place. Petitioner submits that the "process" is not implicated if the non-voters' interests aren't affected by the outcome of the election. This is not the case of "similarly situated voters." The Transfer Territory voters are interested; the non-Transfer Territory voters are disinterested. Neither the PUSD nor the Court of Appeal can find facts which show that the non-voters have an interest in this election.

The "interests" of the Transfer Territory voters include: the district in which they reside (non-Transfer Territory voters remain where they are – no change); who will be their elected school district officials (non-Transfer Territory voters will retain the same representatives – no change); whether to be subject to the SMUSD school district parcel tax (non-Transfer Territory voters will not be subject to such a tax – no change); whether to approve future funding for the schools **in their district** (non-Transfer Territory voters will vote when and if asked to approve financing for their district – no change).

There is not one single **fact** affecting non-Transfer Territory voters to which Respondent can point which is changed, amended, altered, affected, touched, implicated or modified in any way by this proposed election. PUSD and the California Court of Appeal have simply begged the question that the non-Transfer Territory voters have a "substantial interest." (Unless, of course, one subscribes

to the theory that a 00.1527% impact on school attendance is a "substantial impact."[4])

The cases cited by the PUSD in its Opposition Brief support Petitioner's position. In each of those cases, a demonstrable link existed between each voter's interest and the outcome of those elections. *See*, cases cited and discussed by Respondent at pages 8 and 9 of its Opposition Brief. There is no such link in this case.

Instead, PUSD attempts to hide its lack of facts behind the desegregation history of the PUSD. That history is not implicated by this proposed transfer because the racial makeup of the PUSD is not affected. PUSD also makes much of the racial makeup of the district, as told in racial percentages. If PUSD wants to cite percentages, let's cite percentages:

Percentages	PUSD Before Transfer	PUSD After Transfer
Black	39%	39%
White	21%	21%
Hispanic	35%	35%
Asian/Other	5%	5%
Attendance	21,600	21,600

So just exactly where is the "racial impact" which justifies judicial intervention on constitutional grounds?

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[4] This Court recently required a much higher threshhold showing of "racial impact" before a Court would intervene. (*See, Freeman v. Pitts*, ___ U.S. ___, 112 S.Ct. 1430 at 1438 (1992). Percentages discussed ranged from 27% to 90%; non-black minority population of "[not] even one percent" noted.)

This transfer makes no discernible impact one way or another on PUSD's racial and ethnic makeup. Yet it is precisely that supposed "impact" which justified the Court of Appeal's intrusion on U.S. Constitutional grounds into California's quasi-legislative process.

The PUSD also tries to characterize these 71-homes as a "white enclave," obviously because such a characterization conjures up an image of isolated privilege amidst a sea of "poor people of color." That is simply not the case.

The truth is that these three blocks are *racially indistinguishable* from mile after mile of adjacent PUSD *and* San Marino Unified School District neighborhoods, stretching in every direction. These 71-homes are simply a small handful of people in the middle of an 8,863,164 population county whose homes happen to be closer to the schools of the SMUSD than the PUSD.

Petitioner and his fellow residents simply would like the opportunity to let their children walk to school.

III.

THIS COURT HAS AN INTEREST IN INSURING THAT ALLEGATIONS OF "RACIAL IMPACT" WHEN USED TO SUPPORT JUDICIAL INTERVENTION INTO LEGISLATIVE MATTERS ARE BASED ON FACT.

Never in the course of this case has the PUSD been able to establish any rational connection between the racial makeup of its student population and the election at issue here.

Petitioner could locate no cases involving schools, desegregation, voting rights, antitrust, copyright, or anything else (except scientific measurement of toxics in environmental cases and DUI cases) where **fifteen one-hundredths of one percent** justified judicial intervention into anything. Such a meaningless threshhold for judicial intervention into quasi-legislative functions of a state agency acting pursuant to its authorizing statutes should be unacceptable to this Court.

IV.

THE CALIFORNIA STATE BOARD OF EDUCATION ACTED LAWFULLY AND CONSTITUTIONALLY IN ESTABLISHING THE ELECTION TERRITORY; NOTHING CITED BY THE COURT OF APPEAL OR RESPONDENT JUSTIFIED JUDICIAL INTRUSION INTO THIS PROCESS.

The state of California did not delegate to its residents the power to veto or ratify every minor boundary adjustment. California did, however, give everyone, whether interested or not, the right to appear and be heard in the process now before the Court. PUSD was heard **seven times** and lost. The power to fix boundaries of its political subdivisions rightfully belongs to the California legislature and the agencies to which the legislature has delegated that authority. The California State Board of Education properly applied the law. The California Court of Appeal and the PUSD have failed to show any facts which justify court intervention in this legislative/quasi-legislative process.

This Court should reestablish the "wall of separation" between court and legislature when it comes to

adjusting political subdivision boundaries in California, or at least demand that inferior courts limit their intervention to cases in which allegations of constitutional failings of agencies are supported by some facts. A maximum theoretical racial impact of 00.1527% is not a "fact" on which the exercise of judicial power should be based. Because the area of race is so sensitive, it is increasingly incumbent upon this Court to demand that all courts limit the exercise of their powers to governmental acts which really do have an impact. The mere accusation of "race" has been in this case every bit as damning to the Petitioner as if it were true, when it is not.

CONCLUSION

This Court should rule that before a litigant can succeed on the basis of an allegation of "racial impact" (which is the entire foundation of PUSD's and the Court of Appeal's position), that litigant must first establish facts which demonstrate that a racial issue exists. There are no such facts here.

Unless a 00.1527% theoretical impact on the racial makeup of the PUSD student body is "substantial" for constitutional purposes, the non-Transfer Territory voters of the PUSD have *no interest in this election*. Their inclusion violates John Musser's right to equal protection. This Court should grant a Writ of Certiorari to make clear that judicial intrusion, on racial grounds, into the plenary authority of a state and its agencies to fix the boundaries

of its internal subdivisions constitutionally requires more than a 00.1527% theoretical impact.

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Respectfully submitted,

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